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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 304 of the)
Telecommunications Act of 1996)

Commercial Availability of)
Navigation Devices)

CS Docket No. 97-80

**CONSOLIDATED REPLY TO OPPOSITIONS
TO PETITION FOR EXPEDITED RECONSIDERATION**

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CONSOLIDATED REPLY

The National Cable Television Association ("NCTA") hereby submits its reply to the Comments and Oppositions to the NCTA Petition For Expedited Reconsideration ("Petition").¹ In our Petition, we urged the Commission to reconsider the decisions in its Report and Order² (1) to adopt rules in this proceeding applicable to analog set-top boxes and (2) to prohibit cable operators from providing integrated set-top boxes -- those that combine both embedded security and non-security functions -- after January 1, 2005.

I. THE NCTA/CIRCUIT CITY ANALOG PROPOSAL SHOULD BE ADOPTED

In our Petition we said the Commission's decision to apply its rules to analog set-top boxes must be reconsidered because the statute does not require the FCC to apply its "separate security" rules to "all types of equipment"; analog scrambling systems raise more difficult security problems than do digital systems and the statute requires that the Commission "not prescribe regulations which would jeopardize" signal security; there are numerous practical and technical problems with separating analog security; the Report and Order itself recognizes that Section 629 does not apply to "all types of equipment"; and the record in this proceeding supports exclusion of analog boxes. For these reasons, we urged the Commission to adopt a variant of a proposal made by Circuit City earlier in this proceeding.³

¹ The Oppositions to which we reply were filed by: (1) The Consumer Electronics Manufacturers Association ("CEMA"); (2) Tandy Corporation ("Tandy"); (3) Circuit City Stores, Inc. ("Circuit City"); (4) The Information Technology Industry Council ("ITI"); and (5) Motorola.

² Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, CS Docket No. 97-80, FCC 98-116, Report and Order, released June 24, 1998, 63 Fed. Reg. 38095 (July 15, 1998) ("Report and Order" or "Order"). Section 304 added Section 629 to the Communications Act of 1934, as amended.

³ See Circuit City *ex parte* presentation, June 4, 1998. If the Commission declined to adopt an "analog exception," NCTA said it should reconsider the timetable it has adopted for separation of analog security since that timetable was premised on the OpenCable™ digital timetable.

Under the NCTA proposal, there would be a limited exception from the rule requiring the availability of separate security modules for subscribers in instances where:

- (a) Only analog services are provided to the particular subscriber;
- (b) The analog services provided to the subscriber in conjunction with digital services have not been scrambled or otherwise encrypted in a way that would impede reception and display through circuitry now in use by consumer electronics and computer manufacturers;
- (c) The analog services, whether or not originally scrambled or otherwise protected, arrive at the subscriber's set-top "in the clear" (e.g., through interdiction or multichannel descrambling); or
- (d) The subscriber has the option of receiving any scrambled analog programming as digital programming also offered by that MVPD.⁴

As Circuit City -- one of the most vigorous proponents of effective "commercial availability" rules -- correctly points out in its filing, in applying its rules to analog boxes, "the FCC went further than is necessary to promote competition in new technology, and so [Circuit City] supports the limited analog exception . . . advocated by NCTA."⁵ Support for the NCTA/Circuit City "analog exception" also comes from the Telecommunications Industry Association ("TIA") (which also filed a petition for reconsideration addressing the application of the new rules to analog boxes), as well as in comments on NCTA's petition filed by Echelon Corporation, Ameritech New Media, and General Instrument.⁶

⁴ See Petition for Expedited Reconsideration, filed by NCTA, August 14, 1998 ("NCTA Petition") at 16-17. A proposed rule amendment to implement this analog exception is attached as an Appendix.

⁵ Circuit City at iii (emphasis in original).

⁶ TIA at 2-5; Echelon at 4-17; Ameritech at 2-5; GI at 2-7. GI also believes that "an exemption for all 'hybrid' devices...is justified." *Id.* at 5-6. The NCTA/Circuit City analog exception proposal does not apply to "hybrid" devices except where the analog programming provided to a subscriber is not scrambled, is delivered in the "clear" or, if scrambled, is also offered to the subscriber as digital programming. See NCTA Petition at 16-17. Under these circumstances, operators need not provide analog separate security modules to the subscriber.

The opposition to the NCTA/Circuit City proposal is limited and not well-founded.⁷ For example, Tandy Corporation and CEMA argue that Section 629 applies to all navigation devices -- analog, digital and hybrid -- echoing the Commission's conclusion in this regard.⁸ But, as we and others have demonstrated, that is not a correct reading of the law and even the Report and Order itself recognizes Section 629 need not apply to "all equipment."⁹ Moreover, the statute requires the FCC to take into account security concerns and, given the demonstrated security problems with existing analog boxes, that alone could justify an "analog exception."¹⁰

ITI argues that record evidence exists demonstrating that separating analog security from non-security is technologically feasible.¹¹ But ITI's citations are to the Report and Order's discussion of the decoder interface. Putting aside substantial legal problems which may arise from use of the decoder interface, the record on reconsideration demonstrates the many technological (and other) problems with using the decoder interface to separate security from non-security functions.¹² Perhaps Circuit City said it best: "The Decoder Interface alternative, developed (as NCTA recognizes) for a

⁷ For example, the sum total of Motorola's argument on the analog exception issue is the conclusion that "[t]he Commission's rules in this area should be technology-neutral and should not distinguish between analog and digital devices. Motorola believes that the Commission has developed rules that are flexible and can be implemented successfully for either type of system." Motorola at 2. ITT makes a similar "technology neutral" argument. ITI at 7. While NCTA agrees the FCC's rules should be technology neutral -- and therefore should be extended to DBS and OVS providers of digital service -- that is irrelevant to a decision to exclude analog boxes for all providers when justified by statutory, legal and practical reasons.

⁸ Tandy at 5, citing Order at ¶27; CEMA at 17-18.

⁹ See NCTA Petition at 13-14.

¹⁰ Id. at 7-9. CEMA's argument that adopting an analog exception constitutes a "permanent waiver" of the "commercial availability requirement" suffers from the same flaw -- misunderstanding what is required by the statute -- as its argument on reconsideration that putting off the effective date for prohibiting operator provision of integrated boxes also constitutes such a "permanent waiver." See NCTA Comments on Petitions for Reconsideration, filed September 23, 1998 at 9-10.

¹¹ ITI at 7. CEMA also takes issue with NCTA's concerns about signal security. CEMA at 22-25.

¹² See, e.g., NCTA Petition at 9-12; TIA Petition at 2-5; GI at 4-5; Ameritech at 4-5; Echelon at 6-9.

different purpose and fast becoming an orphan in terms of potential implementation, should be put to rest insofar as this proceeding is concerned.”¹³

ITI and CEMA argue that the Commission has addressed NCTA’s security concerns by providing for an exception under certain conditions.¹⁴ But, as NCTA pointed out and ITI concedes in a footnote,¹⁵ the Commission stated explicitly that the “exception” would not apply to “any equipment that it was contemplated might be separated out using the ‘decoder interface’ standard approach”

Finally, ITI belittles the “potential legal complications” NCTA cited in its Petition as a reason that the Commission should refrain from applying its rules to analog boxes and citing the decoder interface as a model.¹⁶ But it seems self-evident from Echelon Corporation’s detailed filing in this phase of the proceeding and its decision to appeal the Report and Order,¹⁷ that working toward a solution to separate security from non-security functions in analog devices might well be a futile--and counterproductive¹⁸ -- gesture pending judicial resolution of the issues Echelon has raised.

¹³ Circuit City at 18.

¹⁴ ITI at 8; CEMA at 19. In the face of documented signal theft losses in the billions (NCTA Petition at n. 17), it ill behooves CEMA to characterize NCTA concerns as “[a]larmist incantations of the danger of cable theft.” CEMA at 24.

¹⁵ NCTA Petition at 6, citing Order at ¶73; ITI at n. 33.

¹⁶ ITI at 8-10; CEMA makes a similar argument. CEMA at 20-22. ITI argues that the “Commission cited the decoder interface only as evidence that industry is capable of resolving any technical issues relating to the separation of security and non-security components of analog devices.” Id. at 9 (emphasis added). That may be correct as far as it goes, but it is still the fact, as CEMA concedes, “[t]he Order expressly relies on the work . . . on the decoder interface.” CEMA at 18 (emphasis added). And, as Echelon points out, “[t]he decoder interface is the only existing standard that can effect the separation of security and non-security modules in an analog setting.” Echelon at 6.

¹⁷ See Echelon at 10-20; Echelon Corporation v. FCC, Case No. 98-1423, filed September 14, 1998 (D.C. Cir.)

¹⁸ See Echelon Comments at 5 (“The Commission’s imposition of its separation requirements on analog technology is flatly inconsistent with the ‘promise of the digital age’ that is the express objective of the Navigation Device Order”).

Given the record in this proceeding -- both in the initial proceeding and on reconsideration -- the Commission should adopt the limited NCTA/Circuit City analog exception supported by Ameritech, Echelon and others.

II. THE OPPOSITIONS PROVIDE NO SUPPORT FOR THE PROHIBITION ON CABLE OPERATOR PROVISION OF INTEGRATED SET-TOP BOXES

One rule adopted in this proceeding prohibits cable operators and other multichannel providers from placing in service “new” integrated navigation devices that combine security and non-security components after January 1, 2005.¹⁹ In a separate statement, Commissioner Powell dissented from this decision, finding “nothing in the statute that requires this result and no persuasive policy reason to interfere with the market in this way.”²⁰ As we demonstrated in our Petition,²¹ because the statute does not permit the Commission to prohibit operators from providing integrated boxes and because there are sound public policy reasons to permit such activities, the Commission’s decision should be revisited.

NCTA’s position was supported by a wide cross-section of commenters.²² Those opposing the NCTA Petition are not persuasive.²³ For example, in response to NCTA’s argument that Section 629(a) will not permit the FCC to adopt a rule prohibiting operator provision of integrated boxes,

¹⁹ Order at ¶69.

²⁰ Statement of Commissioner Michael K. Powell, Dissenting In Part (“Powell Dissent”).

²¹ NCTA Petition at 17-25.

²² See TIA Petition at 5-7; Time Warner Petition at 3-9; Ameritech at 5-9, Echelon at 20-22, GI at 7-16, WCA at 3-7.

²³ Motorola merely offers a rote endorsement of the conclusion in the Report and Order, adding that the rule will benefit consumers. Motorola at 2. ITI simply asserts unbundling will advance consumer welfare and repeats other arguments in the Report and Order already addressed in NCTA’s Petition. ITI at 5-6. Neither commenter adds anything of substance to the debate on this issue since they essentially repeat the arguments made in the Report and Order, already addressed by the NCTA, Time Warner and TIA Petitions.

Circuit City makes the claim that

NCTA and TIA cite to §629's reservation that MVPDs may, subject to subsidization provisos, continue to provide navigation devices to customers for the proposition that MVPDs must be allowed to provide navigation devices in any form, format or configuration they choose.²⁴

This is not what NCTA said, nor what Section 629 says. The relevant provision of Section 629(a) is not discretionary; it does not say MVPDs "may" do anything. Rather it is a prohibition on what the FCC may do in implementing Section 629: "Such [FCC] regulations shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers"²⁵

Circuit City apparently also misunderstands NCTA's argument with respect to integrated boxes and signal security. Circuit City claims "NCTA resorts to the argument, disproved by the very existence of the OpenCable™ project, that hardwired security is necessary to protect system security."²⁶ But that is not what we said. Rather, we stated that the record evidence clearly demonstrated that embedded security contained in integrated equipment is a more secure method of protecting intellectual property,²⁷ which the Commission, pursuant to Section 629(b), must take into account.²⁸

²⁴ Circuit City at 11. CEMA makes a similar argument. CEMA at 5 (claiming Section 629(a) merely preserves the status quo). CEMA's citations to Section 629(f) and the FCC's equipment rate regulation rules are as mystifying as they are inapposite. CEMA at 6 and n. 6. Contrary to CEMA's suggestion, the FCC would not be permitted to prohibit operator provision of equipment under the cited rate regulation rules.

²⁵ 47 U.S.C. §549(a) (emphasis added).

²⁶ Circuit City at 13 (emphasis added). See also Tandy at 8; CEMA at 6-7.

²⁷ While separation of digital security is feasible, there is no question that separated security modules, smart cards and the like are more vulnerable to piracy than embedded security. See e.g., "Pirates Fined \$31 million," Broadcasting & Cable, August 10, 1998 at 52 (DirecTV and NDS Americas awarded over \$31 million in damages from defendants who sold counterfeit DSS access cards and other devices).

²⁸ See Letter from Senator Conrad Burns, Chairman, Senate Commerce Committee Subcommittee on Communications, to FCC Chairman William E. Kennard, June 4, 1998 at 1 ("I do not see how the

(Footnote cont'd.)

CEMA argues that the prohibition on integrated boxes will not chill innovation,²⁹ and attempts to minimize the statement in the Conference Report cautioning the FCC “to avoid actions which could have the effect of freezing or chilling the development of new technologies and services.”³⁰ Contrary to CEMA’s claims, prohibiting cable operator provision of integrated boxes -- and the economies of scope and scale such integration brings -- would have just such an adverse effect on the development of new technologies and services. Similarly, CEMA claims there is no evidence that bundling increases efficiency, reduces costs, or will spur innovation.³¹ But presumably the fear of such efficiencies and cost reductions is what is driving CEMA and others to prohibit cable operator provision of integrated boxes.³² And, in fact, there is ample evidence in the record indicating that a ban on integrated devices will impose substantial added costs on operators and consumers.³³

As for innovation, operator provision of integrated boxes will undoubtedly “prime the pump” for a retail market by allowing subscribers to lease boxes and sample new services, before they

Commission could read a prohibition on an MVPD’s ability to offer an integrated device to be consistent with [Section 629(a)], especially given the well-expressed security concerns set forth in the statute itself and the legislative history.”).

²⁹ CEMA at 9-10.

³⁰ H.R. Rep. No. 104-458, 104th Cong., 2d Sess. 181 (1996) at 181 (“Conference Report”).

³¹ CEMA at 12-13. CEMA cites to the unbundling in the “telecommunications CPE market” as a model for this proceeding. *Id.* at 12-13. But, as we reminded CEMA in our comments on its Petition for Reconsideration, those CPE rules required unbundling of service rates from equipment (already required of cable operators), not the “unbundling” of one type of equipment from another. In any event, the Communications Act precludes regulating cable systems as common carriers. 47 U.S.C. §541(c).

³² To take advantage of their own economies of scale and scope, retailers such as Circuit City envision integrating the non-security functions and the host interface for separate security modules into all types of consumer electronics equipment such as television sets, VCRs, DVD players, etc. See Letter from Robert S. Schwartz, counsel for Circuit City Stores, Inc., to Ms. Magalie R. Sales, FCC Secretary, April 2, 1998, attaching March 27, 1998 ex parte statement.

³³ See NCTA Petition at 12; GI at 14; Ameritech at 4-5, n.12.

commit to purchasing boxes at retail. CEMA calls this argument “astounding.”³⁴ But, among others, Commissioner Powell agrees with NCTA’s assessment: “I fear that this decision may in fact contradict another goal of Section 629, to spur innovation and competition.”³⁵

Section 629(d) requires that “[d]eterminations made or regulations prescribed by the Commission with respect to commercial availability to consumers of [navigation devices]” prior to the 1996 Act “shall fulfill the requirements of [Section 629].” Circuit City claims that Section 629(d) does not oblige the FCC to follow “prior specific determinations even if they occurred on the same issue before Congress instructed the FCC to assure competitive availability of navigation devices.”³⁶ But that is not what the plain meaning of Section 629(d) reflects, nor would that reading make any sense. So the FCC’s prior determination not to “preclude cable operators from also incorporating signal access control functions in multi-function component devices that connect to the Decoder Interface connection,”³⁷ is binding on the FCC in this proceeding.

Circuit City’s description of other proceedings in which the FCC has “phased out” equipment demonstrates the error in the FCC’s reliance on those cases.³⁸ In our Petition, we noted that those cases involved the prohibition on use of equipment that either would become obsolete or that would

³⁴ CEMA at 13.

³⁵ Powell Dissent at 2.

³⁶ Circuit City at 9 (emphasis in original). CEMA also addresses this issue. CEMA at 8-9.

³⁷ Equipment Compatibility Reconsideration Order, 11 FCC Rcd 4121, 4127 (1996). (March 1996 decision clarifying pre-1996 Act determination). Since this post-1996 Act decision merely clarified a pre-1996 Act FCC determination, it is binding on the FCC. Contrary to CEMA’s suggestion, NCTA’s Petition acknowledged the timing of these decisions. See NCTA Petition at n. 48; CEMA at 9 and n. 37. Also, CEMA is incorrect in its assertion that the equipment compatibility proceeding “did not concern the commercial availability of navigation devices.” CEMA at 9. See Equipment Compatibility Order, 9 FCC Rcd 1981, 1988-89 (at ¶42) (1994); 1992 Cable Act §17 adding Section 624A(c)(2)(C) to Communications Act (FCC shall prescribe rules “to promote the commercial availability, from cable operators and retail vendors . . . of converter boxes . . .”). 47 U.S.C. §544a(c)(2)(C).

³⁸ Order at notes 167-68; Ness Separate Statement at 1.

not work on the system for which it was intended as a result of changes ordered by the Commission. That is not the case with the integrated set-top boxes prohibited by the Commission's rule. Circuit City proves as much by describing the two cases it cites as instances where the equipment at issue would "not comply with new narrowband channel allocations" and would not "recognize new" carrier identification codes.³⁹

In our Petition, we also explained the numerous public interest reasons supporting cable operator provision of integrated boxes.⁴⁰ CEMA takes issue with these reasons.⁴¹ For example, CEMA criticizes NCTA's argument that cable operator provision of integrated boxes will increase consumer choices.⁴² But it is not only NCTA that makes that claim. As Commissioner Powell has said, prohibiting operator provision of integrated boxes "interferes with market choices for equipment design."⁴³ He continued: The Commission has "not been asked to ensure that consumers switch to devices that become available through retail, only that they have that choice."⁴⁴

³⁹ Circuit City at 8 (emphasis added)

⁴⁰ NCTA Petition at 22-25.

⁴¹ CEMA at 10-15. Circuit City claims that if operator provision of integrated boxes is permitted, operators will have no incentive to encourage the availability of separate security modules. Circuit City at 11. But if the Commission's rules call for the availability of separate security modules, operators will abide by those rules. See also GI at 17-18, n.53, citing GI Initial Comments, Appendix A, Stanley M. Besen and John M. Gale, An Economic Analysis of the Commercial Availability of "Navigation Devices" Used in Multichannel Video Programming Systems, (May 16, 1997) at 18, concluding that if operators are required to offer separate security devices "they will have neither the incentive nor the ability to prevent the development of a retail market for features boxes. As a result, there will be no competitive harm from permitting them also to offer integrated boxes."

⁴² *Id.* at 11-12. CEMA also disputes NCTA's claim that unsophisticated consumers will benefit from operator provision of integrated boxes. *Id.* at 14. But, the point is not that consumers will be confused, but rather that they should have the choice of leasing an integrated box from operators before they commit to purchasing boxes at retail.

⁴³ Powell Dissent at 2.

⁴⁴ *Id.* (emphasis added).

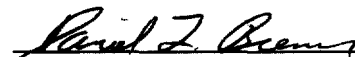
Finally, in its Petition for Reconsideration, WCA sought clarification that -- should it be retained -- the prohibition on operator provision of integrated boxes as of January 1, 2005 does not apply to set-top boxes that are "in inventory as of that date or are deployed prior to that date but subsequently [are] returned to inventory by virtue of subscriber churn."⁴⁵

Tandy and CEMA oppose the WCA requests.⁴⁶ However, Circuit City states that, on these issues, "the Commission should interpret its [Order] flexibly to alleviate the concerns that have been raised."⁴⁷ We agree with Circuit City. For these reasons, if the Commission retains its rule, set-top boxes acquired by operators prior to January 1, 2005 should be exempt from the integrated box prohibition through the end of their useful lives.

CONCLUSION

For the reasons stated above, the Commission should grant NCTA's Petition for Expedited Reconsideration, and do so on an expedited basis.

Respectfully submitted,


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⁴⁵ Wireless Cable Telecommunications Association International Petition for Reconsideration at 4. As we said in our Petition, the prohibition applies only to the sale, lease or use of new integrated boxes on or after January 1, 2005, and the Commission's Order makes clear that it does not apply to "equipment which has already been placed in service by the MVPD" before January 1, 2005. NCTA Petition at 17, citing Order at ¶69. For this reason, integrated devices which have been deployed to subscribers prior to January 1, 2005 -- even if they have subsequently been returned to inventory -- are not "new boxes" within the meaning of the integrated box prohibition and, assuming the prohibition is not eliminated, may be "redeployed" after January, 2005.

⁴⁶ Tandy at 9; CEMA at 16-17.

⁴⁷ Circuit City at n. 46.

APPENDIX

§76.1204 Availability of equipment performing conditional access or security functions

• • •

- (3) A multichannel video programming distributor that utilizes navigation devices to perform conditional access functions need not make available equipment that incorporates only the conditional access functions of such devices to a subscriber when:
 - (a) Only analog services are provided to that particular subscriber;
 - (b) The analog services provided to the subscriber in conjunction with digital services have not been scrambled or otherwise encrypted in a way that would impede reception and display through circuitry now in use by consumer electronics and computer manufacturers;
 - (c) The analog services, whether or not originally scrambled or otherwise protected, arrive at the subscriber's set-top "in the clear" (e.g., through interdiction or multichannel descrambling); or
 - (d) The subscriber has the option of receiving any scrambled analog programming as digital programming also offered by MVPD.

CERTIFICATE OF SERVICE

I, Leslie D. Heath, do hereby certify that copies of the foregoing CONSOLIDATED REPLY were sent via first-class, postage prepaid, United States mail, this 1st day of October, 1998, to the following:

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